**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| WAYNE T. SMITH, | : | |
| Plaintiff, | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | NO. 01-6038 |
| BERNARD WEEKS, JENNIFER ARTHUR, BRENDA SAFFORD and MARK KORN, | : | |
| Defendants. | : | |

**MEMORANDUM**

BUCKWALTER, J. December 9, 2002

Presently before the Court are Plaintiff's Amended Complaint, Defendants Bernard Weeks's and Jennifer Arthur's Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6) and Defendants Brenda Safford's and Mark Korn's Motion to Dismiss Amended Complaint for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6).[1] For the reasons set forth below, Defendants' Motions to Dismiss are **GRANTED** in part and **DENIED** in part.

1. Defendants Weeks and Arthur, as employees of the Greater Philadelphia Urban Affairs Coalition, have filed a separate Motion to Dismiss from Defendants Safford and Korn, who are employees of the Luzerne Treatment Center.

## I. BACKGROUND

Plaintiff Wayne Smith ("Plaintiff" or "Smith"), who claims to suffer from rheumatoid arthritis, a degenerative joint disease,[2] was released from SCI Graterford[3] on November 13, 2000. Plaintiff presumably lived at the Luzerne Treatment Center ("LTC") from the time of his release until the incidents which give rise to this Amended Complaint. Pl.'s Am. Compl. at ¶ 19. Since the incidents, Plaintiff has been incarcerated at the State Correctional Institution at Pittsburgh. Pl.'s Am. Compl. at ¶ 8.

According to Plaintiff, LTC is a facility contracted out by the Department of Corrections which houses ex-offenders, including Plaintiff. Pl.'s Am. Compl. at ¶ 14. Defendants Brenda Safford ("Safford") and Mark Korn ("Korn") are employees at LTC. According to Safford and Korn, LTC is a for profit, private organization, which is employed to assist ex-offenders with drug and alcohol related problems who were previously incarcerated. Safford and Korn stress that LTC is not employed solely to assist these ex-offenders, it also houses other individuals. LTC has its own rules, regulations and standards, and it decides whom to select into its program.[4] Defs. Safford's and Korn's Br. in Supp. of Mot. Summ. J. at 7-8.

Defendants Bernard Weeks ("Weeks") and Jennifer Arthur ("Arthur") are employees of the Greater Philadelphia Urban Affairs Coalition ("GPUAC"). Plaintiff describes

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2. Smith alleges that he suffers severe pain, loss of mobility, difficulty walking and extreme swelling and stiffness as a result of his disability. To alleviate some of the symptoms, Smith takes strong medication and wears corrective shoes. Pl.'s Compl. at ¶ 9.

3. SCI Graterford is a state correctional facility located in Montgomery County.

4. LTC is a drug program for substance abuse violators of parole in lieu of reincarceration. The Pennsylvania Association on Probation, Parole and Corrections, www.pappc.org/journal/spring-2001/3htm (Nov. 22, 2002).

GPUAC as a federally funded[5] program designed to assist the homeless and ex-offenders in securing employment and housing. Pl.'s Am. Compl. at ¶ 10. Weeks is a case manager and classroom instructor at GPUAC, and Arthur is a supervisor at GPUAC. Pl.'s Am. Compl. at ¶¶ 10, 11.

Plaintiff alleges that, sometime during December, 2000, he realized he was running low on his arthritis medication and needed a refill. Pl.'s Am. Compl. at ¶ 20. After repeated failed attempts to obtain a refill, Plaintiff requested permission to visit his doctor and the pharmacy in order to resolve the problem. Pl.'s Am. Compl. at ¶¶ 21-23, 25-28. On January 8, 2001, a nurse at LTC authorized Plaintiff to leave the premises for the purpose of acquiring his medication.[6] Pl.'s Am. Compl. at ¶¶ 29-32.

When Korn approved the nurse's leave instructions for Plaintiff, Korn asked Plaintiff whether he would be attending school at GPUAC after he got his medication. Plaintiff said that he was not sure, and Korn instructed Plaintiff to call GPUAC if he was not going to make it to school that day. Pl.'s Am. Compl. at ¶¶ 35-38. Plaintiff then signed the log book and left LTC. Pl.'s Am. Compl. at ¶ 39. Plaintiff was able to resolve the matter and refill his prescription, but it took nearly the entire day. He arrived back to LTC after 3 p.m. on January 8, 2001. Pl.'s Am. Compl. at ¶¶ 40-46, 48. Plaintiff alleges that he did call GPUAC at some point during the day to inform one of his instructors that he would not be attending school that day. Pl.'s Am. Compl. at ¶ 46.

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5. Plaintiff is correct that GPUAC's programs are sponsored by governmental grants, but they are also sponsored by direct support from corporations and foundations. Greater Philadelphia Urban Affairs Coalition, www.gpuac.org/annualreport.pdf (Nov. 22, 2002).

6. Plaintiff alleges that he had been without his medication for several days by this time. Pl.'s Am. Compl. at ¶ 31.

The following morning, on January 9, 2001, as Plaintiff was getting ready for school, Safford informed Plaintiff that the bathrooms were not cleaned as they were supposed to be, and that Plaintiff should clean them. Pl.'s Am. Compl. at ¶ 54. Although Plaintiff explained to Safford that he was very stiff and sore, and that he would be late for school if he stayed to clean, Safford yelled at Plaintiff and insisted that he stay to clean. Pl.'s Am. Compl. at ¶¶ 55-56. Plaintiff did so and did not arrive to GPUAC until 10:15 a.m. Pl.'s Am. Compl. at ¶¶ 57-58.

Plaintiff's reasons for going to GPUAC on January 9 were not to attend class, but rather to submit verification of his previous day's activities, to inform Arthur and Weeks that he had interviews that day and to get tokens for the bus so that he had transportation to his interviews. Pl.'s Am. Compl. at ¶ 59. Upon arrival, Weeks was upset with Plaintiff for being late. Plaintiff was instructed to wait in the hall until Weeks was prepared to speak with him. After approximately 40 minutes, Plaintiff was given the opportunity to speak with Weeks and explain why he was late and what his intentions were for the day. Pl.'s Am. Compl. at ¶¶ 60-65.

After Plaintiff explained himself, Weeks asked Plaintiff where his interviews were and why he was wearing shoes that were inappropriate to wear to interviews. Plaintiff explained that he was waiting to put his dress shoes on until he actually reached the interviews because, given his disability, these shoes hurt his feet. Plaintiff alleges that Weeks was not satisfied with Plaintiff's answers. Weeks got very upset with Plaintiff and told him that he was to come to school dressed for his interviews. Weeks then informed Plaintiff that, since he was not properly dressed, Weeks was going to call Safford and Korn to tell them he was sending Plaintiff back to LTC. Pl.'s Am. Compl. at ¶¶ 66-70. When Weeks left to call Safford and Korn, Plaintiff spoke with Arthur to try to clear up the situation. Arthur seemingly understood and believed Plaintiff's

explanation of the events. She gave Plaintiff permission to go to his interviews, and she gave him four bus tokens so he could take the bus to these interviews. Pl.'s Am. Comp. at ¶¶ 81-91.

Plaintiff left GPUAC at 11:30 a.m. for his interviews. He claims that he first went to Comcast to fill out an application. Pl.'s Am. Compl. at ¶ 92. Following this, Plaintiff went to Barber Resources for an interview, followed by an interview at RSVP Research Services with Julie Levi ("Levi"). Levi immediately offered Plaintiff a job and told him to return on January 11, 2001 for training. Pl.'s Am. Compl. at ¶¶ 93-96. When Plaintiff returned to LTC that evening, he saw that his remaining passes for the week had been crossed off of the log sheet. Pl.'s Am. Compl. at ¶ 99.

The following morning, on January 10, 2001, Safford called Plaintiff into her office to ask where he was the previous day. Plaintiff explained that he had been on interviews, but Safford did not believe him. Plaintiff offered to provide proof of his attendance at his interviews, and proof that Arthur had granted him permission to attend these interviews, but Safford told Plaintiff that she did not want to see it. Plaintiff alleges that he even attempted to show Korn his proof, but Korn also rejected his proposal. Safford then told Plaintiff that he was not permitted to go to GPUAC that day. Pl.'s Am. Compl. at ¶¶ 101-14.

Immediately after this meeting, Plaintiff called Arthur so that she could clear up the situation by calling Safford or Korn. Arthur agreed to do this. Pl.'s Am. Compl. at ¶¶ 120-22. After Arthur spoke with Safford, Plaintiff went back to Safford's office, but Safford told him that he still was not free to go anywhere that day. Pl.'s Am. Compl. at ¶¶ 130-32. At midnight that night, Plaintiff alleges that officers and staff from Graterford entered his cell at LTC, forcibly removed him at gunpoint and took him to Graterford. Plaintiff was dressed only in his

underwear, and he was not wearing any shoes.[7] Plaintiff was strip searched and cavity searched. Plaintiff also claims that he was in a lot of pain throughout the entire ordeal, and he was not given his medication at that time or for approximately ten days following his transfer to Graterford. Pl.'s Am. Compl. at ¶¶ 139, 190(e).

On January 31, 2001, Plaintiff received a pass to report to his Unit Manager's office. Plaintiff did not know why he was called there. Upon arrival, he was told that a hearing was being held to determine whether he could regain community corrections status. Pl.'s Am. Compl. at ¶¶ 212-14. Plaintiff explained the events which gave rise to his reincarceration from his perspective. However, he did not have any supporting documentation with him at the hearing, and he was not allowed to retrieve this documentation of where he had been on January 9, 2001. Pl.'s Am. Compl. at ¶¶ 217, 226-28. Plaintiff was told that, as a result of the hearing, it had been decided that his community corrections status was revoked. Pl.'s Am. Compl. at ¶ 239. Plaintiff alleges that he appealed this decision to the Program Review Committee, but he never received a response. Pl.'s Am. Compl. at ¶ 243.

## II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) is granted where the plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This motion "may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Maio v. Aetna, Inc., 221 F.3d 472, 481 (3d Cir. 2000). While the court must accept all factual allegations

7. It is significant that Plaintiff was not wearing any shoes, because he needs corrective shoes to ease the pain he suffers from his rheumatoid arthritis. In his transfer from LTC to Graterford, Plaintiff was forced to walk a long distance, and, as he was not allowed to wear his shoes, he suffered considerable pain.

in the complaint as true, it "need not accept as true 'unsupported conclusions and unwarranted inferences.'" Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184-85 (3d Cir. 2000), *quoting* City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1997). In a 12(b)(6) motion, the defendant bears the burden of persuading the court that no claim has been stated. Gould Elecs., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

Generally, in a 12(b)(6) motion, the court is only to consider the pleading which is challenged by the motion. Pryor v. NCAA, 288 F.3d 548, 560 (3d Cir. 2002). However, if the court does choose to consider matters outside of the pleading, the moving party's claim is converted into a motion for summary judgment. Fed. R. Civ. P. 12(b); In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999).

Where the plaintiff is a pro se litigant, the court is to construe his pleadings very liberally. Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002). The court will "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." Holley v. Dept. of Veteran Affairs, 165 F.3d 244, 248 (3d Cir. 1999).

## III. DISCUSSION

Ordinarily, when a party against whom a motion to dismiss is filed does not respond to the motion, there is a presumption that the non-moving party acquiesces in the factual allegations of the moving party's motion. Fed. R. Civ. P. 8(d). However, in the instant matter, given the fact that Plaintiff is a pro se litigant, this Court has granted him significant leeway. Accordingly, the Court has reviewed Defendants' Motions to Dismiss as though Plaintiff responded to them.

Plaintiff has made numerous claims in his Amended Complaint. As he is a pro se litigant, his claims are not all clearly defined within the ambit of the law nor are they all appropriately named. However, it appears as though Plaintiff's claims fall within three broad categories - constitutional claims, state law claims and administrative law claims. Plaintiff's constitutional claims include alleged violations of Plaintiff's rights pursuant to 42 U.S.C. §§ 1983 and 1985 ("§ 1983" and "§ 1985", respectively), Plaintiff's rights to due process and equal protection under the Fourteenth Amendment, and Plaintiff's rights to privacy and confidentiality. Plaintiff's constitutional claims also include conclusory allegations of violations of the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff's state law claims consist of allegations of negligence, gross negligence and negligence per se by Defendants. Finally, Plaintiffs administrative law claims consist of numerous alleged violations of the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the Pennsylvania Human Relations Act.

**A. Constitutional Claims**

§ 1983 allows a plaintiff to file a private cause of action against a state actor for violating his rights protected under the Constitution. Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002). To establish a § 1983 claim, the conduct complained of must be committed by a person acting under color of state law, and the conduct must have deprived a plaintiff of rights provided by the Constitution or federal law. Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." U.S. v. Price, 383 U.S. 787, 794 n.7 (1966). If conduct of a private party is rightly considered state

action, that conduct must be fairly attributable to the State, and the private party must be fairly described as the State itself. See Brown v. Phillip Morris, Inc., 250 F.3d 789, 801 (3d Cir. 2001).

The Supreme Court has developed several tests for determining whether the action of a private entity can be considered state action. The Third Circuit defined the three most significant of these tests as the government/public function test, the symbiotic relationship test and the close nexus test. Groman v. Twp. of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995); Brown, 250 F.3d at 801. Under the government function approach, the actions of a private entity can be considered state action if the action is one "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). The symbiotic relationship approach questions whether the government has "insinuated itself into a position of interdependence" with the private entity. Brown, 250 F.3d at 803. Under the close nexus approach, "'the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action [of the private party] so that the action of the latter may be fairly treated as that of the State itself.'" Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993), *quoting* Jackson, 419 U.S. at 351 (1974).

Defendants allege that Plaintiff has not offered any evidence that GPUAC and LTC are state actors. As such, Defendants believe Plaintiff has no viable § 1983 claims, and all his constitutional claims should be dismissed. However, the threshold level to be met by a plaintiff to withstand a motion to dismiss is very low.

> The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. Dismissal under 12(b)(6) is not appropriate unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

In re Rockefeller Ctr. Props. Sec. Litig., 2002 U.S. App. LEXIS 23259, at *35-6 (E.D. Pa. Nov. 8, 2002).

In the instant matter, Plaintiff has alleged some facts to indicate that GPUAC and LTC could be state actors. He indicates that GPUAC is a federally funded organization, and that LTC is a facility which contracts with the Department of Corrections to house ex-offenders. Pl.'s Am. Compl. at ¶¶ 10, 14. Although Plaintiff has not provided enough evidence to show that he will ultimately prevail on this issue, he has demonstrated a base for his claim that LTC and GPUAC are state actors.

Defendants, on the other hand, have not shown beyond a doubt that Plaintiff cannot prove LTC and GPUAC are state actors. See In re Rockefeller Ctr. Props. Sec. Litig., 2002 U.S. App. LEXIS 23259, at *35-6. In fact, Defendants provide very little evidence regarding the nature of the organizations for which Defendants work. As for the facts that are presented, there is no evidence offered outside of Defendants' Motions to Dismiss to support these facts. Defendants would have this Court accept the facts set forth in their briefs as true. However, facts presented in Defendants' briefs cannot be presumed true. Had Defendants attached affidavits setting forth essential facts in their case, this Court could have converted Defendants' Motions to Dismiss to Motions for Summary Judgment under Rule 56. See Pryor, 288 F.3d at 560.

Without the appropriate factual support from Defendants, this Court presently has no basis for finding that GPUAC and LTC are not state actors. Accordingly, Plaintiff's constitutional claims are not dismissed.

**B. State Law Claims**

Federal courts have supplemental jurisdiction over state law claims if they are so related to federal claims over which the courts have jurisdiction that the state law claims form part of the same case or controversy as those federal claims. 28 U.S.C. § 1367(a). In the instant matter, Plaintiff has alleged several state law claims in negligence. Presently, this Court has not dismissed Plaintiff's constitutional claims. As such, this Court declines to make a determination as to whether the state law claims should be dismissed at this time. However, if it is later determined that Plaintiff has no valid constitutional claims, Plaintiff's negligence claims will be dismissed. This Court will not exercise supplemental jurisdiction over state claims, where no valid federal claims exist. See Oliveira v. Twp. of Irvington, 41 Fed. Appx. 555, 556-7 (3d Cir. 2002).

**C. Administrative Law Claims**

In his Amended Complaint, Plaintiff alleges several violations of the ADA, the Rehabilitation Act of 1973 and the PHRA. To make claims in federal court under these acts, an aggrieved individual must first exhaust the administrative remedies which are available to him under each of these acts. The purpose of requiring exhaustion is so that the parties against whom claims are brought have notice of such charges, and can voluntarily comply, if they so choose, without resorting to litigation. Glus v. G.C. Murphy Co., 562 F.2d 880, 888 (3d Cir. 1977); Dreisbach v. Cummins Diesel Engines, 848 F.Supp. 593, 595 (E.D. Pa. 1994).

To bring suit under the PHRA for disability discrimination, a plaintiff must file a complaint with the Pennsylvania Human Relations Commission ("PHRC") within 180 days of the alleged discriminatory act. Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1987). If a plaintiff does not file such a complaint, he is precluded from bringing suit in the district court. Id. Similarly, to file suit in the district court under the ADA, an individual must first file a grievance with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the alleged discriminatory act. 43 P.S. § 959(h); Spindler v. SEPTA, 47 Fed. Appx. 92, 94 (3d Cir. 2002).

The same is also true for a claim under § 504 of the Rehabilitation Act, which is presumably the section pursuant to which Plaintiff's Rehabilitation Act claims were brought. Under the Rehabilitation Act, a complainant must contact an Equal Employment Counselor within 45 days after the alleged discriminatory act has occurred. 29 C.F.R. § 1614.105(a)(1). If the complainant fails to do so, he may be granted an extension by the agency who allegedly discriminated against him, if he can show that he was not notified or otherwise aware of the time limit, that he was not aware that the discriminatory action occurred, that he was unable to contact a counselor due to circumstances beyond his control, or for other reasons which the agency considers sufficient. 29 C.F.R. § 1614.105(2).

In this case, Plaintiff has failed to offer pleadings which indicate that he filed grievances with the EEOC, the PHRC or an agency which could grant relief pursuant to the Rehabilitation Act. Without first exhausting his administrative remedies, this Court lacks jurisdiction over Plaintiff's claims. See Fitzgerald v. Apfel, 148 F.3d 232, 234 (3d Cir. 1998). As it appears that Plaintiff has not already filed with any of these agencies, he will be unable to

timely file grievances, unless he is granted an extension pursuant to the Rehabilitation Act. Therefore, it is likely that Plaintiff has lost his opportunity to make claims under the ADA, the PHRA or the Rehabilitation Act.

## IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are granted with respect to their administrative law claims, and denied with respect to their constitutional and state law negligence claims.

An appropriate Order follows.

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| WAYNE T. SMITH, | : | |
| Plaintiff, | : | |
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| Defendants. | : | |

**ORDER**

AND NOW, this 9th day of December, in consideration of Plaintiff's Amended Complaint (Docket No. 37), Defendants Bernard Weeks's and Jennifer Arthur's Motion to Dismiss Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 39) and Defendants Brenda Safford's and Mark Korn's Motion to Dismiss Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 43), it is hereby **ORDERED** that Defendants' Motions are **GRANTED** in part and **DENIED** in part. More specifically, it is **ORDERED** that Defendants Weeks's and Arthur's Motion and Defendants Safford's and Korn's Motion are **DENIED** with respect to Plaintiff's constitutional claims and state law negligence claims, and Defendants Weeks's and Arthur's Motion and Defendants Safford's and Korn's Motion are **GRANTED** with respect to Plaintiff's administrative law claims.

BY THE COURT:

RONALD L. BUCKWALTER, J.